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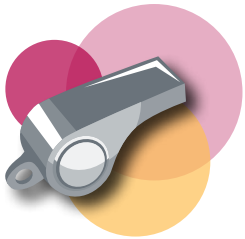

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

There's a Whistleblower on the RIF List. Should She Stay There?

By Jim Curtis and Meagan Newman

Hypothetical, based upon a real fact pattern: An employee has complained to DOJ or OSHA about improper work practices and has been open about her whistleblowing. Unfortunately, the Company's profits are down significantly at year end and the Company must terminate 15% of the workforce and the whistleblower is on the list of employees to be terminated.

What should the Company do?

Reductions in force (RIFs) trigger a number of legal issues. If your company is beginning the process of compiling a list of employees who will be affected, you have likely already considered many of the biggest legal challenges. You explored and handled the WARN Act, ERISA, Older Workers Benefit Protection Act (OWBPA), union, contract and state and/or federal anti-discrimination provisions, including Title VII and Age Discrimination in Employment (ADEA) issues--*but have you considered whistleblower issues?*

The whistleblower issues are not always apparent. Human resources databases may help you track and identify those employees that may be protected--or whose employment status triggers other legal considerations--based on age, labor contracts, race, ethnicity or other status, however, whistleblower status is often not so easily identified by the systems and processes we rely upon to compile accurate, non-discriminatory lists of employees to be included in a reduction. In many cases, this is exactly how we want it to be. There is no checkbox on employment applications or evaluations for "whistleblower tendencies." Decisions about employment, including promotion, demotion and termination, should not take in to account an employee's whistleblower status. As we have discussed many times before in previous *Workplace Whistleblower* posts, decisions about employment--especially those that result in adverse action--should never be based on whether a person has raised concerns or made complaints about potentially unlawful conduct. The difficulty, of course, lies in the fact that we know the risks and potential liability associated with whistleblower claims.

So, in many cases the decision to take adverse employment action will be made with knowledge of whistleblower activity, and the decision to proceed will be made despite that activity--not because of it.

In this way, decisions about inclusions in RIFs are no different. In some cases, they will be made with knowledge of whistleblower status and in many cases they will be made without such knowledge. However, because of the risk of litigation, the finalization of any list of affected employees should be preceded by some evaluation of the potential risk associated with whistleblower discrimination claims.

Coordination among those involved in the decision-making process for the RIF is critical. The human resources department and employment law counsel must work together to finalize any list of affected personnel. Where an employee's whistleblower status is known, like in this hypothetical, care should be taken to ensure that any person alleged to be involved in the conduct that was the subject of the whistleblower's complaint is excluded from the decision-making process. Even further, the person(s) to whom the whistleblower has directed her complaints internally should be removed from the RIF decision-making process.

RIF List Due Diligence

Employment counsel should review a list of names to be included in a RIF and should use her best efforts to determine whether an employee about to be selected for a RIF has recently made an internal complaint. This does not necessarily mean that any person who makes a complaint or otherwise engages in protected whistleblowing activity is immune from a RIF. However, it does mean that the potential risk of inclusion of a whistleblower on the RIF list should be recognized and evaluated before the RIF decision is finalized.

Timing is Everything

As with many things in employment law—and life—so much depends on the timing. The closer in time between employer knowledge of protected whistleblowing activity and adverse action, such as a RIF, the more likely that a fact-finder will draw an inference that the two are connected.

Each of the various laws that provide protection for whistleblowers carries its own burden of proof. In most instances the fact-finder will be looking for proof that either the whistleblowing activity was a "contributing factor" or "but for" cause of the adverse action. Often the evidence used to satisfy this burden of proof is the uncannily close timing of the whistleblowing and adverse action. In a RIF situation, however, what may appear to be very close timing may not actually be the case. The decision to initiate a RIF, how many employees will be affected, and who those employees will be, are often made weeks, if not months, in advance of the actual RIF. Thus, where an employee becomes vocal about her whistleblowing activity only days before the RIF notices go out, it is unlikely that the decision to include her in the RIF was made with knowledge of her whistleblowing activity.

There are also situations where an employee who is otherwise eligible for inclusion in the RIF becomes a whistleblower early in the RIF process. The RIF process need not be artificially delayed in order to avoid the appearance of a close temporal connection, nor should the employee automatically be removed from the RIF list because of her whistleblower status. However, in these situations an extremely careful evaluation of the reasons for her inclusion in the RIF should be undertaken by employment counsel.

Just Like Math Class, Show Your Work

In almost every case, documentation will make or break a defense to a whistleblower complaint. Be sure to document the RIF process, from the earliest stages, so that you can present that evidence later to prove that the whistleblower was included on list solely for legitimate, non-discriminatory reasons. Factors such as length of service and departmental/division headcount should be easy to document in a neutral, non-privileged manner. Where RIF decisions take in to account performance evaluation ratings, be sure that where a known whistleblower has been included on the RIF list, the performance evaluations that were included in the evaluation preceded any knowledge of protected whistleblower activity. Where this is not the case, be sure that the evaluation itself was not impacted by the whistleblower activity by reviewing the written evaluation(s) and consulting with the reviewers. Again, the results of this additional evaluation that has verified that the underlying evaluations were not negatively impacted by whistleblowing activity, should be documented in a non-privileged manner. Of course, if the evaluation leaves any doubt about whether the employee was included in the RIF as a result of her whistleblowing activity, she should be removed from the RIF list until further investigation is conducted and additional personnel action is taken, if necessary, with respect to the evaluators.

Conclusion

When there is a RIF of 15% of the workforce you are almost guaranteed to be taking adverse action against employees who are protected in some way. As with many employment law issues, communication is a key factor. If such a drastic measure is imminent, it is likely that employees are aware and nervous. Every effort should be made to communicate with all employees about the measures the company has taken to remedy the economic situation so that they understand that the decision to terminate anyone's employment was not made lightly. The Company should also communicate as clearly as possible regarding the basis for inclusion in a RIF. Effective communication can go a long way toward reducing the risk of claims being filed. Ultimately, a careful evaluation--and documentation--of the decision-making process is the best way to reduce the risk of litigation in the first instance and reduce the risk of liability if a claim is filed.

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